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Hand Delivered

Honorable C. Bruce Loble, Chief Judge
Montana Water Court
601 Haggerty Lane
P.O. Box 1389
Bozeman, MT 59771-1389

RE: Revisions to Water Court Rules
Our File No. 66040\2004

Dear Judge Loble:

The purpose of this letter is to comment on proposed revisions to the Water Court Claim Examination Rules. My comments are as follows.

Rule 1.II(4) states a temporary preliminary decree "may be a portion of a future preliminary decree . . . or may be portions of future preliminary decrees for several basins."

Mont. Code Ann. § 85-2-231 already contains a definition of a temporary preliminary decree. Creation of a new definition in the Rules brings with it the potential for conflict between the statute and the rule.

Rule 1.II(5) deletes the criteria formerly in place for extensions of time for filing of objections after issuance of a decree. As a preliminary matter, I think the Court should only extend the time limit for a maximum of two additional ninety-day periods.

In addition, I think it makes sense to retain the requirements that an objector show good cause prior to requesting an extension.

Rules 1.II(7), (8), and (9) all grant the Water Court unilateral authority to bring claims in on motion and to deal with issue remarks which have not received objections.

As originally designed, the purpose of the Water Court was to resolve objections raised by stakeholders in the adjudication process. The Water Court was intended as a neutral arbiter of disputes. It was not intended to become an objector on behalf of the state or the public, or a guarantor of accuracy in the adjudication process.

For several years, the DNRC acted to protect the State's interests by objecting to water rights in each decree. It has since discontinued this practice. The Water Court has no obligation to step into the vacuum left behind by the DNRC's abandonment of its former role as guardian of the public interest.

If the State of Montana believes the interests of the public require scrutiny of every claim with an issue remark, then it should provide sufficient funding for the attorney general or the Department of Natural Resources and Conservation to undertake this task.

Burdening the Water Court with responsibility for bringing claims in on motion will substantially elongate an already lengthy process. This is especially true if the Court obligates itself to examine each and every claim, as opposed to simply reserving the discretion to review claims. Creating a new dual role for the Court raises fundamental issues of equity and fairness, as well as concerns that the Court cannot simultaneously be good at two roles with vastly different objectives.

In addition to these problems, the Court should also be aware that some water users may begin relying on the Court to voice their objections to claims with issue remarks. Under the current system, those who fail to object can only blame themselves for the outcome. Under the new system, they can blame the Court. They may even forego or withdraw objections if the Court obligates itself to bring every remarked claim in on motion.

Rule 1.II(11) introduces ambiguity regarding the role of a person filing a notice of intent to appear. Historically, notices of intent to appear were filed to pursue issues raised by other objectors. The new language requires a person filing a notice of intent to appear to prepare a "statement of the appearing person's legal rights that might be affected by a resolution of the objections or issues involving the specific claim and the purposes for which further participation is sought." This standard is potentially broader than the standard which applies to an objector.

Subsequent provisions of the same rule state that a notice of intent to appear should be treated as a request for intervention under **Rule 24(a)**. The standard for intervention under Rule 24(a) is different from the standard quoted in the preceding paragraph. A comparison of the language of Rule 24(a) to the new rule highlights these differences.

Clarity on this issue is important. If a notice of intent to appear is to be treated as a request for intervention, then it should be handled solely under the requirements of **Rule 24(a)**. Conversely, if the Court's intention is to limit the purpose or utility of notices of intent to appear, then the scope of a notice of intent to appear should be more substantially limited than it is in the draft rule, and reference to Rule 24(a) should be deleted.

Rule 1.II(23) pertaining to settlements provides, "the Water Court may also require the settling parties to provided [sic] documentation or additional proof to substantiate the historical beneficial use of the claim as represented in the settlement."

This sentence contradicts prior statements in the new rules which do not require additional proof if the settling parties are not seeking to enlarge attributes of the water right claim. Likewise, this statement arguably contradicts protections afforded to claimants by the *prima facie* status of the claim. Accordingly, this sentence should be deleted from the rule.

Rule 1.II(31) substantially expands the role of the Water Court to include administration controversies.

For a variety of reasons, the present adjudication process is taking too long. By statute, administration of water rights is the responsibility of district courts. Simply put, the Water Court does not have time to become embroiled in administration controversies which will consume substantial resources and divert the Court from its primary mission of adjudicating water rights.

This does not mean the Water Court should not continue to provide its advisory role to district courts as specified in the administration statutes. The Court should not, however, carve out for itself an entirely new responsibility which conflicts with its primary mission.

Sincerely,

RUSS McELYEA

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